No. 86-1295 (4)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ASHLAND OIL, INC.,

Appellant,

—v.—

HERSCHEL H. ROSE, III,
State Tax Commissioner of West Virginia,

Appellee.

ON APPEAL FROM THE SUPREME COURT
OF APPEALS OF WEST VIRGINIA

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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Appellant Ashland Oil, Inc. ("Ashland") submits this brief in opposition to Appellee's Motion to Dismiss or Affirm ("Appellee's Motion"). To the extent that Appellee's Motion raises questions that were not addressed in Ashland's Jurisdictional Statement or that require clarification, those questions are discussed below in the order in which they are presented in Appellee's Motion.[1]

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1 Ashland states pursuant to Rule 28.1 that the Designation of Corporate Relationships filed as Appendix G to Ashland's Jurisdictional Statement is currently accurate.

APPELLEE'S JURISDICTIONAL ARGUMENT

As a threshold matter, Appellee maintains that "[t]he lower court did not uphold a state statute in the face of a constitutional challenge, and this appeal is not within the jurisdiction of 28 U.S.C. § 1257(2). Accordingly, this appeal should be dismissed." Appellee's Motion at 3. A brief review of the jurisdictional statutes and the facts underlying this appeal shows these contentions to be far off the mark.

This Court has appellate jurisdiction to review a final judgment rendered by the highest court of a state "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution . . . and the decision is in favor of its validity." 28 U.S.C. § 1257(2) (1982). Both of these requirements are satisfied here.

In the Supreme Court of Appeals of West Virginia ("West Virginia Supreme Court") Ashland maintained that the West Virginia wholesale business and occupation tax at issue could not be collected from it because the taxing statute violated the Commerce Clause. It is difficult to imagine how one could more directly draw into question the validity of a state statute on the ground of its being repugnant to the Constitution.

Appellee apparently is of the view that the constitutional validity of the West Virginia statute was not drawn into question within the meaning of 28 U.S.C. § 1257(2) because the decision of the West Virginia Supreme Court was based on retroactivity grounds. Appellee's Motion at 3. However, the basis of the West Virginia Supreme Court's decision is beside the point. The focus of the first requirement of 28 U.S.C. § 1257(2) is the issue that was presented for decision, and Ashland's contention throughout the proceedings in West Virginia was based upon the constitutional invalidity of the West Virginia taxing statute. Under Appellee's view, this Court would never possess appellate juris-

diction under 28 U.S.C. § 1257(2) to review a case presenting solely a retroactivity question, a view at odds with precedent. *See, e.g., Lemon v. Kurtzman*, 411 U.S. 192 (1973) (appeal granted to determine retroactive application of a prior decision invalidating a state statute on constitutional grounds).

The second requirement of 28 U.S.C. § 1257(2)—that the appealed decision be in favor of validity of the state statute—has also been met here. The sole result of the decision below was to uphold the very state statute of which Ashland complained against Ashland's constitutional claim. Consequently, one cannot avoid the conclusion that the decision below in fact upheld the validity of the state statute in question. As stated by this Court in *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 at 441 (1979):

> We have held consistently that a state statute is sustained within the meaning of § 1257(2) when a state court holds it applicable to a particular set of facts as against the contention that such application is invalid on federal grounds.

In the present case, although the West Virginia Supreme Court acknowledged that the taxing statute at issue had been held unconstitutional by this Court in *Armco Inc. v. Hardesty*, 467 U.S. 638 (1984), it nevertheless concluded that the tax imposed by the statute could be collected from Ashland. The West Virginia Supreme Court thus held the West Virginia taxing statute applicable to the particular set of facts presented herein, against Ashland's contention that the statute could not be applied because it violated the Commerce Clause. This Court accordingly has jurisdiction to hear this appeal.[2]

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2 Even if it could be concluded that an appeal does not lie under 28 U.S.C. § 1257(2) because Ashland did not challenge the validity of a state statute as being repugnant to the Constitution, or because the decision below was not in favor of validity of the statute at issue, Ashland's Jurisdictional Statement should be treated, pursuant to 28 U.S.C. § 2103, as a petition for certiorari under 28 U.S.C. § 1257(3), and the petition should be granted. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 562-63 n.4 (1980); *Addington v. Texas*, 441 U.S. 418, 422-23 (1979).

APPELLEE'S STATE LAW ARGUMENT

After the decision of this Court in the *Armco* case, on July 6, 1984 the Tax Commissioner of the State of West Virginia filed a Petition for Rehearing which asked the Court "to clarify its Opinion of June 12, 1984 by directing that its decision herein be applied prospectively to all taxpayers, with the exception of appellant Armco." Petition for Rehearing at 1-2, *Armco* (No. 83-297). Alternatively, the Petition requested that, should additional facts be necessary to resolve the retroactivity issue, the case be remanded to the courts of West Virginia for resolution of that issue. *Id.* at 18-18b. On August 9, 1984, this Court entered an order requesting that Armco file a response to the Petition for Rehearing, and Armco's response, urging the Court to resolve the retroactivity issue, was filed on September 7, 1984. Appellant's Response to Appellee's Petition for Rehearing, *Armco* (No. 83-297). On October 9, 1984, the Petition for Rehearing was denied. *Armco Inc. v. Hardesty*, 467 U.S. 638, *reh. denied*, 469 U.S. 912 (1984) (Justice Powell, the author of the majority opinion in *Armco*, noting that he would grant the Petition).

From the events recited in the preceding paragraph Appellee inexplicably concludes that in this case the West Virginia Supreme Court "properly interpreted that resolution of the prospectivity question had been referred to it by this Court." Appellee's Motion at 6. Ashland suggests that the most likely ground for denial of the Petition for Rehearing in *Armco* was the lack of a case or controversy between the parties before the Court with respect to retroactivity. But be that as it may, the simple denial of the Petition cannot rationally be interpreted as a referral by this Court of the retroactivity issue to the West Virginia Supreme Court.

In support of the referral theory Appellee relies on the decisions of this Court in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984); *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985); and *Williams v. Vermont*, 472

U.S. 14 (1985). Such reliance is misplaced. In *Bacchus* a state taxing statute was attacked by taxpayers as unconstitutional, and the taxpayers claimed refunds of taxes paid. The highest court of the state determined that the statute was valid, and that court accordingly did not have occasion to consider the claims for refund of the tax. This Court reversed the state court, holding the statute at issue to be in violation of the Constitution. In considering the state's argument that the refunds claimed should not be granted, even though the statute pursuant to which the taxes had been collected was unconstitutional, this Court in *Bacchus* stated:

> These refund issues, which are essentially issues of remedy for the imposition of a tax that unconstitutionally discriminated against interstate commerce, were not addressed by the state courts. Also, the federal constitutional issues involved may well be intertwined with, or their consideration obviated by, issues of state law.[14] Also, resolution of those issues, if required at all, may necessitate more of a record than so far has been made in this case. We are reluctant, therefore, to address them in the first instance. Accordingly, we reverse the judgment of the Supreme Court of Hawaii and remand for further proceedings not inconsistent with this opinion.
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> 14 It may be, for example, that given an unconstitutional discrimination, a full refund is mandated by state law.

468 U.S. at 277.

Thus, *Bacchus* merely stands for the proposition that this Court may be reluctant to consider remedial issues preliminary to a full consideration of them in the court below, particularly where the disposition of the issues by the court below may render moot any potential constitutional issues. If, after full consideration of these issues by the state courts, it is determined that no refund of the tax is permissible under state law,

that would raise an issue of constitutional dimensions which would be ripe at that time for this Court's review.[3]

None of the factors which moved this Court to remand *Bacchus* to the state court are present here. The sole issue presented by this appeal is whether the State of West Virginia may affirmatively invoke its processes to collect an unconstitutional tax. Equally important, this question was fully briefed and argued in the West Virginia Supreme Court, and that court specifically decided the retroactivity question. Ashland therefore has no further recourse in the State of West Virginia with respect to the question presented herein, and this question is therefore ripe for this Court's review at this time.[4]

APPELLEE'S FINALITY ARGUMENT

Appellee advances two principal points in support of its contention that the decision below should not be considered final for purposes of 28 U.S.C. § 1257(2). First, Appellee maintains that *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), establishes a "threshold requirement" that no federal questions remain to be decided before a decision will be considered final. Appellee's Motion at 24. And second, Appellee maintains that Ashland is asking for "two

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3 Indeed, this Court has held that "a denial by a state court of a recovery of taxes enacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment." *Carpenter v. Shaw*, 280 U.S. 363, 369 (1930). *See also Ward v. Board of County Comm'rs.*, 253 U.S. 17, 24 (1920) ("[t]o say that the county could collect these unlawful taxes by coercive means and not incur any obligation to pay them back is nothing short of saying that it could take . . . property . . . arbitrarily and without due process of law.")

4 For basically the same reasons that *Bacchus* is inapposite here, so are *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985) and *Williams v. Vermont*, 472 U.S. 14 (1985). In *Hooper*, this Court remanded a case without deciding whether a refund was appropriate where it was determined that a state taxing statute was unconstitutional after the state court had sustained the statute. In *Williams*, the state court had dismissed a taxpayer's assertion that a tax was unconstitutional on the ground that the taxpayer's pleadings had failed to state a claim. This Court reversed and remanded for consideration of the substantive merits of the taxpayer's claims.

days in Court" and that resolution of the issue presented in this case can be postponed "without adverse effect". *Id.* at 25.

Appellee's suggestion that the *Cox* finality analysis requires that no further federal questions remain to be decided in the state courts is simply wrong. Although it was noted in *Cox* that in most cases in which the pragmatic approach to finality had been adopted no other federal questions remained for decision in the state courts (420 U.S. at 477-78), this Court did not characterize the absence of other federal issues as a requirement of finality. On the contrary, the cases cited in *Cox* in connection with this comment indicate that this Court was referring to cases in which the additional federal issue remaining for decision in the state courts is inextricably interwoven with the federal question raised on appeal. Thus, the Court in *Cox* stated:

> Eminent domain proceedings are of the type that may involve an interlocutory decision as to a federal question with another federal question to be decided later. "For in those cases the federal constitutional question embraces not only a taking, but a taking on payment of just compensation. A state judgment is not final unless it covers both aspects of that integral problem." *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 163 (1973).

420 U.S. at 477-78 n.6.

Moreover, the *Cox* decision itself cites with approval (420 U.S. at 483) *Local No. 438 Construction & General Laborers' Union v. Curry*, 371 U.S. 542 (1963), a case in which a federal issue would have been preserved for appeal to this Court after completion of further state court proceedings, but finality was nevertheless found to be present. Clearly, this Court in *Cox* did not intend to preclude a finding of finality solely on the ground that federal claims which are factually and legally unrelated to the issue appealed are pending in the courts below.

In the present case the federal question pending in the West Virginia courts (*i.e.*, the nexus question) will be rendered moot if this Court determines that its decision in the *Armco* case precludes collection of the tax involved here. Moreover, a resolution of the retroactivity issue presented in this appeal is neither factually nor legally related to the nexus question. Thus, this appeal does not present merely a part of an integral question, and the pendency of the nexus question in the West Virginia courts therefore should not affect the conclusion that the decision of the West Virginia Supreme Court in this action was final for purposes of 28 U.S.C. § 1257.

Finally, Appellee's suggestions that Ashland is seeking "two days in Court" and that a resolution of the issue presented here may be postponed "without adverse effect" (Appellee's Motion at 25) are relevant only if one assumes the outcome of the remaining state proceedings. However, if this Court refuses to hear Ashland's appeal at this time, and Ashland is successful in asserting its nexus argument in the West Virginia Supreme Court, there will be no opportunity for this Court to review the retroactivity decision handed down by the West Virginia Supreme Court. This unfortunate precedent would thus stand immune from review by this Court.

This Court has held that the possibility of effectively immunizing a state court decision from review is itself sufficient cause for attributing finality to the decision. In fact, in *Cox*, this Court based its determination of finality on these grounds, stating:

> [The appellants] may prevail at trial on nonfederal grounds, it is true, but if the Georgia court erroneously upheld the statute, there should be no trial at all. Moreover, even if appellants prevailed at trial and made unnecessary further consideration of the constitutional question, there would remain in effect the unreviewed decision of the State Supreme Court that a civil action for publishing the name of a rape victim disclosed in a public judicial proceeding may go forward despite the First and Fourteenth Amendments. Delaying final decision of the First

> Amendment claim until after trial will "leave unanswered . . . an important question of freedom of the press under the First Amendment," "an uneasy and unsettled constitutional posture [that] could only further harm the operation of a free press." On the other hand, if we now hold that the First and Fourteenth Amendments bar civil liability for broadcasting the victim's name, this litigation ends. Given these factors—that the litigation could be terminated by our decision on the merits and that a failure to decide the question now will leave the press in Georgia operating in the shadow of the civil and criminal sanctions of a rule of law and a statute the constitutionality of which is in serious doubt—we find that reaching the merits is consistent with the pragmatic approach that we have followed in the past in determining finality.

420 U.S. at 485-86 (citations and footnote references omitted).

Precisely the same situation is presented here. If this Court refuses to hear this appeal, Ashland will be forced to invest substantial time and expense in defending against the imposition of this tax on nexus grounds in the West Virginia courts, despite the fact that this Court has already determined the taxing statute to be unconstitutional. But if the West Virginia Supreme Court erroneously held the taxing statute applicable to Ashland, as this Court noted in *Cox*, there should not be a trial at all. Moreover, again as in *Cox*, even if Ashland is successful in resisting the tax on nexus grounds in the West Virginia courts, there will remain in effect the unreviewed decision of the Supreme Court of West Virginia refusing to apply a constitutional decision of this Court under circumstances which cannot fairly be distinguished from those passed upon in this Court's decision in the *Armco* case. Accordingly, the decision of the West Virginia Supreme Court should be considered final for purposes of 28 U.S.C. § 1257.

CONCLUSION

For the foregoing reasons, Appellee's Motion to Dismiss or Affirm should be denied, and this Court should note probable jurisdiction and grant plenary consideration of this appeal.

Dated: April 15, 1987

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